

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Judge

Appellate Case No. 2016-001727

RECEIVED
SEP 19 2019
SC Court of Appeals

Adele J. Pope.....Petitioner,

v.

Alan Wilson, in his capacity as Attorney General of South Carolina, and James Brown Legacy Trust, by Russell Bauknight, its Trustee.....Respondents,

PETITION FOR WRIT OF CERTIORARI

TO: The Honorable Chief Justice and Associate Justices of the Supreme Court.

Adele J. Pope ("Petitioner") respectfully petitions this Court for a writ of certiorari by which to review the opinion of the South Carolina Court of Appeals ("court of appeals") in *Pope v. Wilson, et al*, Op. no. 2019-UP-219. Petitioner submits that this Court should issue the requested writ, as this matter presents the novel question of law of whether an entity created and controlled by the South Carolina Attorney General is a "public body" for purposes of the South Carolina Freedom of Information Act.

CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a timely petition for rehearing was made to the court of appeals, and the same was denied by Order dated August 22, 2019.

QUESTION PRESENTED

Did the Court of Appeals err in failing to find the James Brown Legacy Trust was a public body and directing that the Legacy Trust be Dismissed on remand?

STATEMENT OF THE CASE

On June 30, 2011, Petitioner made a request of the James Brown Legacy Trust for certain documents under the S.C. Freedom of Information Act, including copies and/or drafts, signed or unsigned, of the James Brown Legacy Trust.¹ [R. 28] Counsel for the James Brown Legacy Trust responded on July 15, 2011, asserting that the James Brown Legacy Trust was not a public body and threatening to sue Petitioner if she made further requests of the James Brown Legacy Trust under the FOIA. [R. 48]

On August 3, 2011 Petitioner commenced this action by filing a summons and complaint for declaratory and injunctive relief against the South Carolina Attorney General (the "AG") and the Legacy Trust in the Newberry County Court of Common Pleas. [R. 15-24] In lieu of answering, the James Brown Legacy Trust moved to dismiss under Rule 12(b)(3), 12(b)(6) and 12(b)(8). [R. 79-80] On September 29, 2011 Petitioner moved for summary judgment. [App. 3-7]

The Newberry Court thereafter transferred venue to Richland County over Petitioner's objection. [R. 13] Petitioner's counsel made numerous requests that the pending motions, including hers for summary judgment, be heard. [App. 24-26]. On May 17, 2016, the lower court conducted a hearing on the pending motions. [R. 9] On June

¹ Petitioner made a request at the same time for documents to Alan Wilson, as Attorney General of South Carolina. Because the question presented in this Petition relates to the James Brown Legacy Trust, the statements of the case and facts incorporate those matters directly bearing on the Legacy Trust.

14, 2016, the lower court issued its order dismissing the James Brown Legacy Trust based on the court's findings that the case was moot; that the legacy trust did not exist; and that the James Brown Legacy Trust was not a public body. [R. 9-11]

Petitioner's timely motion to alter, amend or vacate the order of dismissal was denied [R. 1-2], and her notice of appeal was filed in the court of appeals on August 19, 2016. [R. 1]

The court of appeals issued its opinion on June 19, 2019, reversing the lower court orders but directing that the Legacy Trust be dismissed on remand. The court of appeals did not identify a standard of review. No clear explanation of the court of appeals' logic in directing the James Brown Legacy Trust's dismissal is given in its opinion, and the court of appeals declined to address the question of whether the James Brown Legacy Trust is a public body. [App. 123-130; App. 128, n. 8] Petitioner's petition for rehearing was denied by order of the court of appeals, dated August 22, 2019. [App. 188]

STATEMENT OF FACTS

James Brown died on December 25, 2006, leaving behind his Last Will and Testament and the James Brown 2000 Irrevocable Trust, both dated August 1, 2000. [R. 372; R. 376] Nearly all of James Brown's music empire was devised to the James Brown "I Feel Good" Charity to educate needy and deserving students in South Carolina and Georgia. [*Id.*] Several acknowledged or alleged family members brought litigation relating to the service of the three fiduciaries named in James Brown's estate plan. On November 20, 2007, Petitioner and Robert L. Buchanan, Jr. were appointed as Personal Representatives of the Estate of James Brown and Trustees of the James Brown 2000 Irrevocable Trust. *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013).

In the fall of 2007 the AG entered the James Brown Aiken proceedings to protect the needy student beneficiaries of the "I Feel Good" Foundation. Since then, two AGs and various AG attorneys and staff members have worked on James Brown matters. [R. 380]

In December 2007, certain acknowledged children of James Brown (represented by Louis Levenson, Esq.) and Tommie Rae Hynie, who claimed to be Mr. Brown's surviving spouse, filed four separate contests to the Will and 2000 Trust. *Id.*

On August 10, 2008 the AG brokered a settlement which the South Carolina Supreme Court later described as a "total dismemberment of Brown's carefully crafted estate plan." *Wilson* at 445, 746 S.E.2d at 764.

The AG and settling parties agreed to create a new trust called the James Brown Legacy Trust, which would "receive, hold, manage and be authorized to sell the James Brown assets." The trustee and any successor trustee for the James Brown Legacy Trust was to be selected solely by the AG. *Id.* at 421, 743 S.E.2d at 752. Nearly half of the James Brown Legacy Trust's assets were to be distributed to a new charity created by the AG. *Id.*

The settling parties agreed to surrender any intellectual property rights to Brown's music or persona created under federal copyright laws or laws for heirs to the James Brown Legacy Trust. *Id.* at 421, 743 S.E.2d 752.

The settling parties agreed the settlement would be a binding private agreement whether or not approved by a court. *Id.* at 422, 743 S.E.2d 753. Russell L. Bauknight ("Bauknight") became trustee of the James Brown Legacy Trust in late 2008 or early 2009. He continues to serve today. [R. 412]

On May 26, 2009 the circuit court approved the AG's settlement and replaced the fiduciaries under Brown's estate plan, Petitioner and Buchanan, with Bauknight. Buchanan and Petitioner appealed.

On May 19, 2010, the AG and the James Brown Legacy Trust sued Buchanan and Petitioner in Richland County seeking tens of millions of dollars. (the "Wingate Suit")² As relevant to this and other FOIA matters, the AG and the James Brown Legacy Trust claimed Buchanan and Petitioner should not have appealed the AG's settlement; should have accepted a \$100 million offer for Brown's assets; and lacked knowledge about copyright law. [R. 17; R. 19; R. 33-34]

The AG, James Brown Legacy Trust and settling parties share private counsel, Sweeny Wingate & Barrow, P.C. in the Wingate Suit. [R. 33]

In December 2010 the AG and others secretly amended the James Brown Legacy Trust. [R. 478]

On June 30, 2011, Petitioner made the FOIA requests which are the subject of this appeal. Petitioner seeks from the James Brown Legacy Trust all signed and unsigned copies of the Legacy Trust, its 2011 amendment, and any other amendments.

On July 15, 2011 the James Brown Legacy Trust declined to comply with the FOIA request. Counsel for the Legacy Trust responded in part:

In the event that you continue to file unnecessary discovery and/or FOIA requests, please be advised that the Trust and Estate will have no other choice than to file an action against you for abuse of process or sanctions. [R. 48]

² The Wingate Suit, Richland County Case No. 2010-CP-40-4900, is sometimes referred to as "Richland 4900."

On May 8, 2013 the South Carolina Supreme Court found that there was no reasonable basis for the undue influence claims asserted by Brown's will contestants other than as a means to dismantle Brown's estate plan. They found that the result of the AG's settlement was to enable those who were disinherited to obtain Brown's assets to the detriment of the charitable entity Brown so fervently desired. The Court found that the AG's settlement was an "unprecedented misdirection of the AG's authority in estate cases." *Wilson* at 445, 743 S.E.2d at 764.

The Supreme Court found that Brown had gone to "remarkable lengths to protect his right to designate the appropriate legacy for his life's work, including having numerous provisions in his estate documents and informing family members of his intentions in advance." *Wilson* at 439, 743 S.E.2d at 762.

The Supreme Court did not, however, void the James Brown Legacy Trust. The James Brown Legacy Trust continues to act, and to hold the Termination Rights proceeds and other assets of the settling parties.

On March 15, 2013 the James Brown Legacy Trust filed a motion to stay this FOIA case. [R. 215, 216]. The James Brown Legacy Trust claimed it might not exist. Yet for the next six years it has continued to pursue the Wingate Suit for the benefit of the AG, Tommie Rae and other James Brown Legacy Trust beneficiaries. The James Brown Legacy Trust asserted incorrectly that "[i]f the status of the James Brown Legacy Trust continues as presently determined by the South Carolina Supreme Court, the Legal [Legacy] Trust will not exist after remittitur." [R. 215, 216]

On March 18, 2013 the Honorable L. Casey Manning requested a status report in light of the Supreme Court's first *Wilson v. Dallas* decision. [R. 218] Petitioner, through

counsel, stated in part:

As is clear from the Supreme Court's opinion, the Court did not declare the Legacy Trust void. Instead, the Court reversed the approval of the *settlement agreement*. Although the decision may have some effect on the management and funding of the Legacy Trust, nothing in the opinion suggests the Supreme Court eradicated the Legacy Trust *ab initio*.

Furthermore, the Legacy Trust's argument that it has no assets is incorrect. Since May 19, 2010 the Legacy Trust has pursued a multi-million dollar claim against Plaintiff [Pope] for alleged breaches of fiduciary duty and trust. Indeed, the Legacy Trust is still one of the lead Plaintiffs in Case 4900, where it has indicated no doubt of its existence. [R. 220]

In the status report, Petitioner referenced and attached documentation from the January 2011 James Brown Legacy Trust amendment, signed by Attorney General McMaster without the participation of Bauknight. [R. 221] Petitioner stated:

The Legacy Trust asks this Court to find that the Attorney General can create an entity which does not have to produce its own public documents if the Supreme Court later finds that the Attorney General's actions were improper. The Court should decline to do so and set a hearing on this matter at its earliest convenience. [R. 222]

On May 8, 2013 the Supreme Court issued its final decision in *Wilson v. Dallas*. The Supreme Court voided the AG's settlement and voided Bauknight's appointments as SA/ST and PR/Trustee under James Brown's estate plan. It made no statement about Bauknight's role as trustee of the James Brown Legacy Trust, which provided that its existence did not depend on court approval.

On May 10, 2013, the AG, James Brown Legacy Trust, and Bauknight on behalf of the AG and other James Brown Legacy Trust beneficiaries, told the lower court in the Wingate Suit, through their private counsel:

... [T]he Supreme Court, in substituting the new opinion has completely eliminated Footnote 29 of the prior opinion. Footnote 29, while

only dicta in the now replaced opinion, addressed, among other items, the FOIA matters and called for them to be heard "in the first instance" without any clear definition of what that meant. Such language is totally absent from the new order. While the court does recognize that the Attorney General is contesting releasing some documents pursuant to FOIA, the court no longer puts any primacy or priority on any court hearing these matters. We believe that such position is entirely appropriate, because the documents requested under FOIA are subject to a claim of privilege which is the subject of a motion for protective order before this court in Case 4900. The claim of privilege must be decided before any court can make a determination of the application of any FOIA claim.

Therefore, the Case 4900 Plaintiffs and Proposed FOIA Intervenors respectfully request that Richland 4900 be held in abeyance in its entirety until all the underlying issues related to the Plaintiffs are resolved by the Aiken Court. Should you deem it best for Plaintiffs to make a formal motion to stay, I would be pleased to do so.

On November 22, 2013 Petitioner requested a FOIA hearing on this and another FOIA case. None was held. [App. 23]

On April 17 and 29, 2014 Petitioner requested a hearing on the two FOIA cases. Wingate objected for the AG and James Brown Legacy Trust. They were not held.

On May 7 and 28, 2014 Petitioner requested a FOIA hearing on the two cases. No hearing was held. [App. 23]

On October 8, 2014 Petitioner requested a hearing in the two FOIA cases. [App. 23] No hearing was held. Another request was made on November 13, 2014, and another on December 2, 2014. No hearing was held. [App. 23]

On March 20, 2015 Petitioner requested a hearing in the two FOIA cases. No hearing was held. [App. 23]

On March 24, 2016 the Honorable Doyet A. Early, III was assigned to this FOIA case [R. 12].

On May 17, 2016 Judge Early heard the motions of the AG and the James Brown

Legacy Trust to dismiss the 2011 FOIA complaints in this case and the FOIA case seeking the Wingate contract. [R., p. 274 – 291]

Petitioner argued that the AG and his staff spent years defending the James Brown Legacy Trust's existence in the Supreme Court and pursuing the Wingate Suit, in part for the benefit of the AG's (new) charity, and that Petitioner is entitled to a declaration that it is a public body and the documents requested. [R. 290, 291]

On June 14, 2016 the circuit court issued orders dismissing Petitioner's FOIA complaint as to both the AG and James Brown Legacy Trust. The orders were filed on June 20 and received by Petitioner on June 24, 2016. [R. 252]

On June 27, 2016 Petitioner served a motion to alter, amend or vacate the order granting the James Brown Legacy Trust's motion to dismiss. [R. 262-265] Among other issues, Petitioner said:

3. The Court overlooked or misapprehended that the...Legacy Trust at all times since the commencement of this action has been an active party in Richland...4900...; has moved to intervene in another FOIA case; and has, through its Trustee, Russell Bauknight, taken action confirming its existence. [R. 262]

Nonetheless, the court of appeals did not make any determination of whether the James Brown Legacy Trust was a public body and instead directed that it be dismissed on remand without any clear explanation of why.

At the commencement of this case, Petitioner properly sought a declaration that the James Brown Legacy Trust was a public body subject to the FOIA. [R. 15-25] The circuit court made an explicit finding on that issue. [R. 5-7] Petitioner and the James Brown Legacy Trust fully briefed the question of whether it was a public body. [App. 41-52; App. 67-73; App. 107-112]

Argument

The Court of Appeals Erred in Failing to Find that the James Brown Legacy Trust is a Public Body and Directing that the James Brown Legacy Trust be Dismissed on Remand.

In its opinion, this Court made no finding on whether the James Brown Legacy Trust was a public body subject to FOIA, despite reversing the lower court's order finding that the James Brown Legacy Trust was not a public body. Instead, the Court remanded the matter with a direction that the circuit court dismiss the James Brown Legacy Trust as a party to this action. [App. 128] This instruction is based on the Court's finding "that the issuance of the *Wilson* opinion mooted the premise for naming the James Brown Legacy Trust as a defendant in this action." [*Id.*] No further explanation is given for this finding, and Petitioner respectfully submits that it is in error.

First, the record and law cited by Petitioner in her briefs below fully support a finding that the James Brown Legacy Trust is a public body. *Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), holds that even indirect public support of an organization could cause that organization to be treated as a public body. Likewise, *Associated Press v. Sebelius*, 31 Kan.2d 1107, 78 P.3d 486 (Kan. 2003), holds that an organization's use of state employees (who were not paid outside their state salaries), meant that it was a public body for FOIA purposes.

Importantly, the James Brown Legacy Trust did not dispute that it was supported by the use of multiple members of the Attorney General's office in defending its creation, funding and continued existence. See *Wilson*, 743 S.E.2d 746, 768.³ Further, it

³ This Court stated, "The AG has taken unprecedented action in this case. After effecting a total takeover of Mr. Brown's estate by excluding its trustees and

commenced and has continued litigation for nine years for the benefit of the AG's (new) charity, its largest beneficial owner.

Even if the *Wilson* decision had somehow terminated the James Brown Legacy Trust (which is inconsistent with the record herein, including the James Brown Legacy Trust's own positions), the Court appears to have overlooked that *Wilson* was not decided until nearly two years after the FOIA request was made in June 2011. At that time, both the James Brown Legacy Trust and the AG were defending the James Brown Legacy Trust's funding and the propriety of the AG's actions in creating the James Brown Legacy Trust in the appeal which would later result in *Wilson*.

If *Wilson* did affect the continued existence of the James Brown Legacy Trust or its status as a public body, any documents possessed or controlled by the James Brown Legacy Trust during the period in which the AG had unfettered control over it would have remained public and must have been preserved for FOIA compliance.

The South Carolina Public Records Act, S.C. Code Ann. §30-1-10, *et seq.*, requires that public bodies maintain their public records. Further, the chief administrative officer of any public body is required, if he has no successor, to deliver public documents in his possession to the Archives. See S.C. Code Ann. §30-1-40. The statutory scheme for maintaining and preserving public records cannot be reconciled with a finding that the obligation the James Brown Legacy Trust had to maintain or release public records was extinguished by the Supreme Court's holding in *Wilson*.

banding together with parties who stand only to gain from the invalidation of the testator's devise, the AG disposed of the court-appointed trustees, created a new settlement entity, and inserted himself into the day-to-day operations of a newly created charitable trust, the Legacy Trust." *Id.*

Further, the record in this case demonstrates that the James Brown Legacy Trust does exist and is a public body. The James Brown Legacy Trust was an active, public body subject to FOIA at its creation in late 2008 or early 2009. [R. 17] It remains so today.

On March 18, 2013, between the first Wilson decision and the final May 8, 2013, decision, the James Brown Legacy Trust claimed in this FOIA action that if the final Wilson decision was consistent with the first ruling, the James Brown Legacy Trust would not exist. After the final decision, however, the James Brown Legacy Trust has continued to function for more than six years in in the Wingate Suit and elsewhere.

In the over six years since the first *Wilson* decision, the James Brown Legacy Trust has pursued the Wingate Suit with and for the AG, Tommie Rae and others the AG chose as beneficiaries of the James Brown Legacy Trust. In addition, its trustee, Bauknight, has remained an agent for Tommie Rae and other will contestants in the Wingate Suit.

The James Brown Legacy Trust moved for and received summary judgment on Petitioner's counterclaims against it in Wingate Suit, and it continues to this day to defend that result on appeal in the court of appeals. See Appellate Case No. 2018-2229, pending in the court of appeals.

Importantly, the James Brown Legacy Trust, through the AG's (new) charity, was 47 1/2% charitable on the day of the Wilson decision. If -- contrary to the evidence -- the James Brown Legacy Trust did cease to exist, Bauknight would have been required under S.C. Code Ann. §62-7-413 and the Internal Revenue Code to take certain actions to protect the charitable assets, including its claim against Petitioner. The AG is the state's official charged with assuring such actions are taken. There is no evidence in the record to suggest that a charitable dissolution took place.

The James Brown Legacy Trust was created and is controlled by the AG. It was active for nearly four years before the *Wilson* decision. It has continued to litigate for over six years since. Nothing in the record supports dismissal of the James Brown Legacy Trust as a defendant.

By reversing the circuit court's order finding that the James Brown Legacy Trust was *not* a public body, but directing that it must be dismissed as a defendant on remand, the court of appeals has prevented both a determination of the James Brown Legacy Trust's status under the FOIA, and the requirement that it comply.

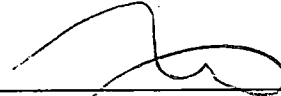
Given all of the above, the court of appeals' finding that the circuit court erred in dismissing the claims against the James Brown Legacy Trust as moot, but that the James Brown Legacy Trust should nonetheless be dismissed in light of the later-decided *Wilson*, should be reversed. Because the issue of whether the James Brown Legacy Trust is public is not moot, this court should grant a writ of certiorari and proceed with deciding this issue, including the James Brown Legacy Trust's obligations under the FOIA, which was briefed extensively by the parties.

Conclusion

For the foregoing reasons, Petitioner respectfully asks this Court to accept this case for review of the court of appeals' opinion.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,



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September 19, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
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The Honorable Doyet A. Early, III, Circuit Judge

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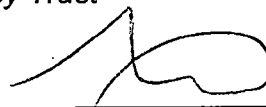
Alan Wilson, in his capacity as Attorney General of South Carolina, and James Brown Legacy Trust, by Russell Bauknight, its Trustee.....Respondents,

PROOF OF SERVICE

I certify that I have served the Reply to Attorney General's Return to Petition for rehearing on all Respondents by mailing a copy of same on September 19, 2019, addressed to his attorney of record as follows:

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Adam T. Silvernail

Law Office of
ADAM T. SILVERNAIL
LLC

September 19, 2019

By Hand-delivery:

The Honorable Daniel E. Shearouse
Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED
SEP 19 2019
SC Court of Appeals

Re: *Pope v. Wilson and James Brown Legacy Trust*
Appellate Case No. 2016-001727

Dear Mr. Shearouse:

In connection with the above-referenced appeal, I enclose the following:

1. Original and six (6) copies of the Petition for Writ of Certiorari;
2. Two copies of the Appendix to the Petition for Writ of Certiorari; and
3. The original and one copy of the Proof of Service showing service on Respondents' counsel.

Also enclosed is a check for \$250.00 to cover the filing fee.

I would appreciate your office filing the originals and returning file-stamped copies of each to the courier who delivers this package. Thank you for your attention to this matter.

Sincerely,



Adam T. Silvernail

Enclosures

Cc: The Honorable Jenny Abbott Kitchings, South Carolina Court of Appeals
J. Emory Smith, Esquire
Keith M. Babcock, Esquire
Ariail E. King, Esquire
David L. Paavola, Esquire
Adele J. Pope, Esquire